

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
BRIEF**





77-1348

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UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Appellee

v

ANDREW TSANAS,

Appellant

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NEW YORK

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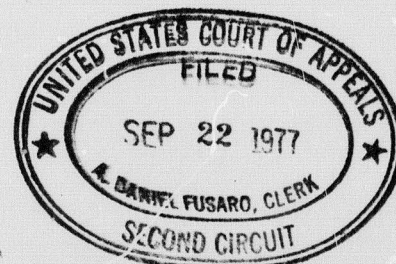
BRIEF FOR APPELLANT ANDREW TSANAS

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APPEAL FROM THE UNITED STATES DISTRICT COURT  
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---

BRIEF FOR APPELLANT,  
ANDREW TSANAS

---

Andrew Tsanas appeals from his conviction on August 5, 1977 in the United States District Court for the Eastern District of New York (Mishler, J.) upon a jury verdict of one count of violating 26 U.S.C. 7206 with respect to the year 1972 (return not true as to every material matter) and 7201 covering the years 1973, 1974 and 1975 (wilfull attempt in any manner to evade or defeat any tax). The jury acquitted him of any income tax wrongdoing with respect to the year 1971. His sentence was three years in prison, a \$15,000 fine, and three years further probation.\* His wife, Pauline, indicted

\* More exactly: Count 2, three years imprisonment and \$5,000; Count 3, concurrent three years term and cumulative \$10,000; Counts 4 and 5, three years probation following the prison terms of Counts 2 and 3. The sentence was one of the heaviest (and perhaps the heaviest) imposed in the district in this type of a case.



with him but not a party to the unreported income activities which gave rise to the indictment, pleaded guilty to one count of violating Sec. 7206. She received one year probation.

Issues Presented For Review

This appeal presents four questions. The first three concern errors in the district court's charge. The last pertains to the Lazar corporate tax returns and the prejudicial media coverage.

1. Whether the district court erred in refusing to let the jury consider the lesser included offense unless it first unanimously acquitted on the greater crime.

2. Whether the district court erred in failing to charge 26 U.S.C. 7207 as a lesser included offense under 26 U.S.C. 7201.

3. Whether the district court erred in its charge on the elements the jury was to consider in determining the question of gift.

4. Whether the district court erred in refusing to direct production of the H. L. Lazar corporate tax returns and in failing to conduct further individual inquiry of the jurors following a newspaper report of Pauline Tsanas' guilty plea.



### STATEMENT OF THE CASE

Until Spring of 1976, Tsanas was employed in the construction department of J.C. Penny. The Government's charge was that between 1971 and 1975 he exacted about \$1.4 million from H. L. Lazar Company, a large New York construction firm, and other building contractors as the price of their entry into Penny's construction boom, and then failed to report these sums as income. Part of the amount purportedly was cash to Tsanas, and the rest payments to others at his direction, or services, e.g., renovating and furnishing his apartment. The ultimate burden of the payments allegedly fell on Penny in the form of inflated contracts to those making the payments.

There was some notoriety to the case. Howard Lazar, the Government's principal witness, had been prosecuted earlier in the state courts for widespread bribery of building inspectors. The size and importance of his firm in New York City construction attracted media attention to that prosecution and to others, such as this, which followed it. The media was interested in Tsanas as well, not only because of the astronomical sums purportedly involved, but because Kenneth Axelson, deputy mayor during the City's financial crisis and a possible nominee for the second spot at the Carter Administration's Treasury Department, was a ranking officer at Penny and seems to have had Lazar renovate his apartment as well.



Because our appeal does not challenge the sufficiency of the evidence, we see no need to review the Government's case in detail. Probably the Government's Brief will do that anyway. We do, however, mark its outlines: as a general setting for the legal discussion and because it is important to the district court's errors, notwithstanding the lack of a sufficiency argument, that so much of the Government's proof was not credible. We can say that not just from the safe vantage of appellate attorneys but because the jury, as we shall show, rejected in toto the testimony of the prosecution's principal witness.

Tsanas and Lazar

H. L. Lazar, Inc. is a privately owned general construction firm. It works mainly through sub-contractors, its own role limited to obtaining the job, co-ordinating all the subs, and performing carpentry and cleanup. During the early 1970's its average annual gross income was about \$50 million. Howard Lazar is an officer and one of the four shareholders. (73-75)\*

According to Lazar, Tsanas asked him in 1971 for \$5,000 as a guarantee that H. L. Lazar get major Penny work which was in the offing; and this money was in fact paid to Tsanas in cash at the St. Moritz in two separate installments of \$2,500 (83-85). Tsanas then insured that

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\* Numbered references, without more, are to the trial transcript. "A" denotes the Appendix to this Brief. "Lazar" sometimes means the company rather than Howard Lazar.



H. L. Lazar received a major job, and allowed it to submit inflated bills to make up for the originally under-cost bid he had to submit to get the contract (88-91).

Thereafter, stated Lazar (92-95), he started paying Tsanas \$5,000 a month, in cash, at various locations, with no one else present. After four such payments the \$5,000 became \$10,000 for nine months into 1972 (97), became \$15,000 for four months starting at the end of 1972 (100), and then \$20,000 until February 1974 (103). During this period H.L. Lazar was the exclusive contractor for work on the Penny building (114).

#### Transfer of the payments to Penguin

Penguin Air Conditioning Corporation was the air conditioning sub-contractor for Lazar on the Penny building. Its president Matthew Segal had done business for many years with H. L. Lazar (815), and also directly with Tsanas (827). At Lazar's direction Penguin had been overbilling Lazar on Penny jobs and was deemed to owe this money to Lazar (823).

Lazar's testimony was that the cash payments of \$435,000 to February 1974 to Tsanas were designed to keep pace with what he owed Tsanas up to then (101). In that month he stopped the payments because the IRS was investigating his company and it was short of cash (105-07). Lazar and Segal both testified, however, that a month or two later, H. L. Lazar still owed Tsanas a

half million dollars and that it was agreed that because Tsanas could no longer trust Lazar, Penguin would take over the obligation (118, 832). Lazar and Penguin would then straighten out what Lazar owed Penguin for doing that in the context of the many jobs between them, including Penny, where there was underbilling overbilling, and so forth (823-24).

The Apartment; Department Store Accounts

According to Lazar and Segal the following then occurred:

(a) Lazar owed Tsanas for work at Penny after transfer of the prior debt to Segal. He gave Tsanas bank checks payable to various New York City retail establishments of Tsanas' choice (113, 119-22). These came to over \$100,000 (121).

(b) Lazar took over renovation of Tsanas' two bedroom East Side apartment and through a designer of his acquaintance the design and furnishings as well. Construction took six months and cost Lazar \$150,000 (131). The fee for design and furnishings, all paid for by Lazar, was over \$400,000 (136).



(c) Segal set up charge accounts for Tsanas at Mark Cross and Cartier's (841-42), placed Tsanas' female friend on its payroll at \$800 a week although she did no work (849), and made cash payments to Tsanas. The charge accounts were over \$100,000 (841, 844), gross salary to the female friend \$55,000 (853), and cash payments more than \$125,000 (854-60). Both Lazar and Segal, at Tsanas' request, made contributions to Poly Prep, attended by Tsanas' son (873).

#### Indictment and Trial

The Government indicted Tsanas and his wife in March 1977, charging that for the five separate years 1971 - 1975, set forth in separate counts (A 4 - A 7), he had wilfully and knowingly attempted to evade and defeat his income tax by filing returns which understated his income, all in violation of the five year felony section, 26 U.S.C. 7201. The understated amounts were roughly \$56,000 in 1971, \$160,000 in 1972, \$240,000 in 1973, \$350,000 in 1974, and \$580,000 in 1975.

Trial took place in June. The Government's case was built mainly on the testimony of Howard Lazar and Matthew Segal, who had made deals for their testimony. Once into the department store, apartment, and girlfriend part of the case, however, it brought many of the people

involved and supporting documents before the jury, as well as other contractors whom Tsanas had allegedly asked for kickbacks, and other evidence of high expenditures. An agent testified to Tsanas statements during the IRS investigation that he had no cash or currency or savings which might have accounted for high expenditures, as well as alleged false exculpatory statements about his dealings with Lazar and Segal (1158-59). Tsanas presented no witnesses. He argued instead that Lazar and Segal had ample motive to fabricate; that the story of a one half million dollar obligation transfer to Segal in March 1974 was contradictory to one half million dollars having already been paid to reflect the debt; that \$550,000 to renovate and furnish a two bedroom apartment was absurd, so that Lazar, the designer and others were obviously fooling around with the invoices; and that if reduced to realistic and manageable figures, much of the alleged payoffs might be considered gifts.

Prior to Lazar's testimony the defense repeated a request it had made well in advance of trial for the H. L. Lazar, Inc. corporate tax returns. The district court denied the request on the Government's representation that it was precluded by law from turning them over (A 41). The court permitted inspection of H. L. Lazar's books and records (A 42-43), but to make any meaningful examination of extensive corporate books (37) in the few hours before



cross-examination of Lazar the next day was impossible.

The defense also requested a charge of the one year misdemeanor statute on submitting a false return, 26 U.S.C. 7207, as a lesser included offense. The district court rejected that and charged instead as the lesser offense 26 U.S.C. 7206, a three year felony statute for submitting any false information in a return (A 33-37). The court told the jury, however, that it could consider the lesser offense only if it found defendant not guilty on the greater (A 33-34). The district court charged on gifts (A 32-33) but in a truncated version which rejected most of defendants' points on the subject.

The jury\* acquitted Tsanas altogether on Count One, covering 1971. On Count Two, 1972, it acquitted under 7201 but convicted on the lesser offense, 7206. It convicted Tsanas under 7201 for the years 1973-1975. The verdict showed the jury's unwillingness or inability to credit Lazar since the first count had rested wholly on Lazar's testimony, and the second mostly on such testimony.

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\* One regular and one alternate had earlier been excused after reading a Daily News article about the guilty plea of Tsanas' wife.



### ARGUMENT

The Government's extensive evidence seemed to show that Tsanas had done something wrong. The issue at trial, however, was not "something" but exactly "what". The different statutory provisions had different requirements and a slight change in facts could make it one rather than the other, carrying significant differences in the penalties: Five years and a \$10,000 fine (7201), three years and a \$5,000 fine (7206), or one year and a \$1,000 fine (7207). The jury, moreover, had shown that it was ready to pick and choose from the Government's evidence. It squarely rejected at least parts of it. The responsibility, therefore, of the district court to define the applicable law and to pose accurately and precisely the possible choices was especially great. In this the district court failed.

### POINT I

THE DISTRICT COURT SHOULD HAVE PERMITTED THE JURY TO CONSIDER THE LESSER OFFENSE EVEN IF IT COULD NOT REACH A VERDICT ON THE GREATER; SHOULD HAVE CHARGED SECTION 7207 AS A LESSER INCLUDED OFFENSE; AND FAILED TO GIVE ADEQUATE INSTRUCTIONS ON THE GIFT QUESTION.

The charge errors are at least three.

First, even assuming that only 7206 was proper as a lesser included offense, the district court improperly treated the manner in which the jury might consider that section. It let the jury move to the lesser offense only if it



first unanimously found the defendant not guilty on the 7201 charge (e.g. A 35). Thus, those jurors who might otherwise have wanted to consider and convict on the lesser offense had first to bring all their fellow jurors to a not guilty view on the greater. Faced with that, and the fact that failure to agree on a guilty verdict on the greater would mean no conviction at all, those jurors were subject to great pressure to give up their views that the only offense was the lesser.

This was wrong. Defendant had a clear right to have the lesser included offense submitted to the jury, Sansone v. United States, 380 U.S. 343 (1965); Keeble v. United States, 412 U.S. 205 (1973), as the district court held. F.R.Crim.P. 31(c) did not prevent the jury from moving to the lesser offense if it could not agree on the greater, and reporting a guilty verdict on the former and deadlock on the latter. The district court could then have declared a mistrial on the 7201 charge. There is a question whether the Government would then be free to re-prosecute on that charge, the more likely view being that it could not. Green v. United States, 355 U.S. 184 (1957); Price v. Georgia, 398 U.S. 323 (1970); United States ex rel Hetenyi v. Wilkins, 348 F.2d 844 (2d Cir. 1965); compare United States ex rel Jackson v. Follette, 462 F.2d 1041 (2d Cir. 1972); United States ex rel Rogers v. LaVallee,



517 F.2d 1330 (2d Cir. 1975). But that was the required result of defendant's clear right to a lesser included offense charge; and even if there could be re-prosecution the whole posture would have been more advantageous to Tsanas than the district court's insistence that the jury first acquit on the greater charge.

Second, the district court selected the wrong lesser offense or, if 7206 was proper, should have charged 7207 as well. The inter-relation between the various offenses specified in the Revenue Code, 26 U.S.C. 7201-7207, is far from clear, and as far as we know the Supreme Court has never addressed this precise point. Between United States v. Bishop, 412 U.S. 346 (1973) and Sansone v. United States, supra, however, we know that if on the facts of the particular case involved there is room for the jury to find the lesser offense because some element of the greater may not be proven (or, put another way, as long as the issues under the different sections are not exactly the same), then the lesser offense must be charged. That was the case here with respect to Sec. 7207, just as it was the case under 7206.

Third, the district court's charge on the gift issue (A 32-33) -- an important defense argument -- was hopelessly inadequate.

(a) The court never expressly told the jury that any amounts received which were gifts were



not reportable at all on Tsanas' return. This had to be said because some of the jurors might have been vaguely familiar with gift tax returns and might have thought that Tsanas was obliged to report these as well; and because just a bit earlier in its charge (A 30) the district court had told the jury that in computing Tsanas' income it "should include any and all funds, whether legally or illegally acquired."

(b) The district court never posed for the jury the fact that there could be several reasons for a payment and that the proper criterion was to examine "the basic reason for [the donor's] conduct . . . the dominant reason that explains his action in making the transfer."

Commissioner v. Duberstein, 363 U.S. 278, 286 (1960).

Thus, even if payments were made to Tsanas in the expectation of future contracts, there had to be inquiry as in Duberstein, into whether there were any other motives to establish which was "dominant". The district court improperly removed that inquiry from the jury by instructing it that "if Mr. Lazar or Mr. Segal or Mr. Eisenberg gave money or paid defendant's bills . . . expecting that the defendant would assure future construction contracts for J. C. Penney, it is not a gift" (A 33).



(c) The payments, according to the district court, could only be a gift if made "without conditions from detached and disinterested generosity, out of affection, respect, charity or like impulses. . . 'out of the goodness of one's heart without any conditions'" (A 32). This test, proper in the case of an individual, has been recognized as improper and misleading when a corporation is involved. Joshel v. Commissioner, 296 F. 2d 645, 647 (10th Cir. 1961):

"The decision in Commissioner of Internal Revenue v. Duberstein, 363 U.S. 278, 80 S.Ct. 1190, 4 L.Ed.2d 1218, is controlling. There it was held that the proper criterion to be applied in determining whether a gift was made is the basic reason in fact for the action of the transferor. We followed Duberstein in United States v. Kasynski, 10 Cir., 284 F.2d 143.

"The Tax Court held that the transfers did not result from '"a detached and disinterested generosity" springing from "affection, respect, admiration, charity or like impulses"' but proceeded primarily from '"the constraining force of [a] moral or legal duty" or from the incentive or anticipated benefits of an economic nature.'

"We are not impressed by the negative holdings of the Tax Court. It is difficult to understand how a corporation for profit can transfer property out of a detached and disinterested generosity arising from affection, respect, admiration, charity or like impulses. These are personal emotions to which a corporation is not subjected, even vicariously. Yet the court in Duberstein rejected the government contention that as an ordinary matter of payment by a corporation cannot be a gift. We agree with counsel for the taxpayers that there may be a business motivation for a gift and that in the case of corporations the personal emotions test is inapplicable."



United States v. Transamerica Corp., 392 F.2d 522, 524

(9th Cir. 1968):

"DeJong involved an individual taxpayer, as to whom the quoted language is a not inappropriate way of phrasing the converse of a purpose to gain a direct economic benefit. It does not seem appropriate, however, to demand of a corporate entity such impulses as affection, respect or admiration. Further, an absolute requirement of detached and disinterested generosity or lack of any business purpose would tend to render ultra vires substantially all charitable contributions and thus to frustrate the congressional intent that corporations should enjoy such deductions. . ."

The district court, moreover, should have made clear that corporate payments can be made in a business context and still be considered gifts. Commissioner v. Duberstein, supra (rejecting Government's proposed test that gift be transfer for personal as distinguished from business reasons); Harper v. United States, 454 F.2d 222 (9th Cir. 1971) (gift in corporate payments to employee's widow related to corporate redemption of his stock); Gaugler v. United States, 312 F.2d 681 (2d Cir. 1963) (gift in payments to president's widow even if sound business reasons lay underneath). The jury instructions, therefore, were misleading and improper and require reversal. United States v. Clark, 475 F.2d 240, 248 (2d Cir. 1973) (reversal where jury has been "confused" or left with an "erroneous impression" on essential elements of the crime), United States v. Fields 466 F.2d 119 (2d Cir. 1972) (every element must be submitted),

United States v. Byrd, 352 F.2d 570 (2d Cir. 1965) (reverse where jury confused on essential element even when that element was covered in other parts of the charge).



POINT II

THE DISTRICT COURT SHOULD HAVE DIRECTED  
PRODUCTION OF THE LAZAR CORPORATE TAX  
RETURNS AND SHOULD HAVE CONDUCTED FURTHER  
INQUIRY OF THE JURORS FOLLOWING THE REPORT  
OF PAULINE TSANAS' GUILTY PLEA.

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A. It is difficult to understand how the district court could let the prosecutor lead it into error in not divulging the H. L. Lazar, Inc. tax returns (A 41-43). 26 U.S.C. 6103(h)(4) clearly permitted their disclosure in this proceeding, and they were certainly "material" under F.R.Crim.P. 16. Lazar, indeed, testified on direct to matters in the return, e.g. 106, 137 and Tsanas had the right to examine the return in connection with the jury's undoubted impression that Lazar had deducted payments to Tsanas as business expenses.

The right to inspect all the corporate books and records was an inadequate and improper substitute.

B. Since this case attracted media interest, special precautions were required to protect the jury's integrity. That did not occur.

On the trial's second day the Daily News ran an extensive article on the guilty plea of Tsanas' wife Pauline. The day after, the district court asked generally of the jurors if they had read anything about the case. Only one responded that he had (A 44) and he was excused. In the court's view he could no longer be objective (A 45).



It turned out, however, that another juror as well had read the article (A 47). He too was excused (A 48). Notwithstanding that the situation obviously called for further individual inquiry of the other jurors, the district court made none. This too was error. Marshall v. United States, 360 U.S. 310 (1959); Mares v. United States, 383 F.2d 805 (10th Cir. 1967) (judge must examine each juror separately on effect of newspaper article, out of presence of remaining jurors, even if such examination not requested by the defense).

#### CONCLUSION

This court should vacate the judgment of the conviction below on account of the errors stated herein and should remand for a new trial.

Respectfully submitted,

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UNITED STATES V. TSANAS - 77-1348

CERTIFICATE OF SERVICE

I certify that on September 22, 1977 I  
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